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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Hearing:
October 26, 2000

Paper No. 33
TEH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kellogg Company
v.
Don R. Mueller

Opposition No. 100,070
to application Serial No. 74/585,082
filed on October 13, 1994

Jeffrey H. Kaufman and Jonathan Hudis of Oblon, Spivak,
McClelland, Maier & Neustadt, P.C. for Kellogg Company.

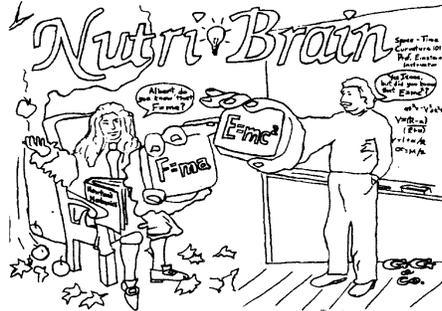
Robert E. Atkins, Jr. of Atkins & O'Brien LLP for Don R. Mueller.

Before Cissel, Quinn and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

An application has been filed by Don R. Mueller to register
the following mark for goods identified as "cookies that in
addition to their nutritional value, introduce a variety of
physical formulas, with a particular formula on each cookie."¹

¹ Application Serial No. 74/585,082 filed October 13, 1994, alleging a
bona fide intention to use the mark in commerce.



Registration has been opposed by Kellogg Company. As its ground for opposition, opposer asserts priority and likelihood of confusion under Section 2(d) of the Trademark Act, contending that applicant's mark when applied to applicant's goods so resembles the following marks previously used and registered by opposer for the identified goods as to be likely to cause confusion.

NUTRI-GRAIN, NUTRI-GRAIN ALMOND RAISIN and NUTRI-GRAIN WHEAT, all for "cereal-derived food product to be used as a breakfast food, snack food or ingredient for making food";² and

NUTRI-GRAIN for "waffles."³

² Registration No. 1,255,456, issued October 25, 1983; Section 8 and 15 filed; Registration No. 1,795,160, issued September 28, 1993, Section 8 and 15 filed; and Registration No. 1,930,343, issued October 31, 1995. Opposer had also relied on Registration No. 1,798,009 for NUTRI-GRAIN WHEAT & RAISINS which was subsequently cancelled under Section 8 on December 23, 2000.

³ Registration No. 1,367,960; issued October 29, 1985; Section 8 and 15 filed.

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Opposer alleges that it has built extensive goodwill in connection with the sales of products under its marks and that purchasers have come to recognize NUTRI-GRAIN as signifying opposer's products.

Applicant, in his answer, has denied the allegations in the notice of opposition.

The record includes the pleadings; the file of the involved application; opposer's notice of reliance on evidence including status and title copies of opposer's pleaded registrations, certain of applicant's discovery responses (including portions of Mr. Mueller's discovery deposition), and 58 news articles in printed publications; applicant's notice of reliance on, inter alia, two samples of opposer's product packaging and a newspaper article about opposer's product packaging; and testimony (with exhibits) of both parties submitted, pursuant to stipulation, in the form of declarations. Only opposer filed a brief and attended the oral hearing.

As indicated above, opposer has made of record status and title copies of its pleaded registrations.⁴ Thus, there is no issue with respect to opposer's priority. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA

⁴ In addition, Mr. David Herdman, Corporate Counsel-Trademarks for opposer, has testified that the registrations are valid and subsisting and owned by opposer. Opposer also introduced an unpleaded registration (Registration No. 1,888,673) through Mr. Herdman's testimony. However, opposer stated in its brief that it is not relying on this registration.

1974). In addition, the evidence shows that opposer has used its NUTRI-GRAIN mark since at least as early as 1981.

We turn then to a consideration of likelihood of confusion. Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue, including the similarity of the marks and the similarity of the goods. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The factors deemed pertinent in this proceeding are discussed below.

Turning first to the goods, we note that it is not necessary that the goods be similar or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

The goods in this case are closely related. Opposer's goods are identified as "cereal-derived food product to be used as a breakfast food, snack food or ingredient for making food." The evidence submitted by opposer shows that these breakfast foods and snack foods consist, in part, of breakfast cereals and food

bars. Applicant's goods are essentially cookies. Cookies, like food bars, are snack food products and thus are closely related to food bars in function and use. In addition, breakfast cereals can also be consumed as a snack. In this regard, opposer has submitted a copy of a container for a General Mills' product called COOKIE CRISP CHOCOLATE CHIP showing a cookie-shaped product marketed as breakfast cereal.

The fact that applicant's cookies may be nutritionally enhanced or imprinted with the depiction of one of a variety of scientific formulas (such as "E=MC²") does not change the nature of the goods from cookies. Applicant claims that the display of the formula on each cookie demonstrates the "educational" nature or focus of its products. However, there is nothing inherently educational about these cookies even with the imprinted formula. It is just as likely that these cookies would be perceived as a novelty snack food as opposed to a snack food with "educational" value. Moreover, the question of likelihood of confusion is based on the goods as identified in the application rather than on any evidence of actual (or intended) use. See *J & J Snack Foods Corp. v. McDonalds' Corp.*, 932 F.2d 1460, 1464, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991) and *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). The language in applicant's identification does not effectively describe any specialized intended use or function of its cookies.

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In fact, both parties' products are ordinary consumer food items which would be sold in the same channels of trade to the same classes of customers. Opposer states that it sells its cereals and snack food products through supermarket chains and independent grocery stores. Applicant has not yet used his mark, but he initially claimed that the primary marketing of his cookies will be "through schools, specialty retailers marketing to children and other outlets featuring educational products." (Mueller decl. p.2). However, applicant subsequently admitted that the anticipated channels of trade for his cookies would include food stores and other retail outlets for food, and that his customers would not be restricted to any age group or level of sophistication. (Applicant's responses to adm. reqs. nos. 10 and 17; and Mueller disc. dep. pp.40 and 110). In any event, applicant's products are not restricted in the identification as to channels of trade or classes of purchasers. Thus, they must be presumed to travel through the channels of trade normally associated with those goods, including all the usual retail outlets for food, and, although children may be among the intended customers of applicant's cookies, applicant's goods, as identified, would be purchased by customers of all types, including opposer's customers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981) and *In re Optica International*, 196 USPQ 775 (TTAB 1977).

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In this regard, we note that the respective products are low cost, ordinary consumer food items and that the purchasers of these products are members of the general public who would not necessarily be likely to exercise the high degree of care necessary to prevent confusion. See *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146, 227 USPQ 541, 542 (Fed. Cir. 1985).

Turning our attention to the marks, we find that although there are specific differences between opposer's mark NUTRI-GRAIN and applicant's mark NUTRI BRAIN (and design), the similarities strongly outweigh those differences. Viewing the marks in their entirety, as we must, it is nonetheless true that more or less weight may be given to a particular feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

In this case, the most prominent part of applicant's mark is the term NUTRI BRAIN. The remaining portion of applicant's mark consists of a cartoon-like depiction of a classroom setting (including a blackboard, chair and books) where the caricatures of two men are engaged in "dialog balloon" type conversation, and scientific formulas and symbols and mathematical equations are scattered about the room. Neither the illustration as a whole nor its individual elements serves to differentiate applicant's and opposer's marks. The composition is so visually cluttered and crowded with activity that it is not likely to be recognized

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by consumers as a source-distinguishing feature of the mark. Further, no single element of the composite makes an impression separate and apart from the remaining elements.⁵ Ultimately, consumers will not rely on this illustration in making their purchasing decisions, but will instead look to the part of applicant's mark that makes the strongest visual impression, i.e., NUTRI BRAIN, to distinguish source. As applicant admits, these are the words that purchasers would use to request his goods in a store. (Mueller dep. p.146). See *In re Continental Graphics Corp.*, 52 USPQ2d 1374 (TTAB 1999) citing *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

The term NUTRI BRAIN, the most significant portion of applicant's mark, and NUTRI-GRAIN, which is opposer's entire mark, are substantially similar in sound. The two phrases rhyme and have the identical cadence. Indeed, the differences in sound between the letters G and B may even be lost on purchasers when the marks are spoken. It has been held that similarity in sound alone may be sufficient to support a finding of likelihood of confusion. See *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968). Nevertheless, these terms are also quite similar in appearance. In fact, they differ in appearance essentially only by one letter. Both consist of two terms which

⁵ Applicant claims that the characters appearing in the drawings are intended to depict famous scientists. However, the characters are not recognizable as such and even applicant admits that relatively few

begin with the identical prefix NUTRI and are followed respectively by GRAIN and BRAIN, both spatially separated from NUTRI, and both consisting of five-letter words with four identical letters.

It is true that the words GRAIN and BRAIN have different meanings. However, this difference is strongly overshadowed by the visual and phonetic similarities of NUTRI-GRAIN and NUTRI BRAIN when viewed as a whole. Moreover, the difference in meaning of those two individual words becomes less significant when we consider that NUTRI-GRAIN and NUTRI BRAIN have a somewhat similar overall connotation in relation to the parties' cereals, food bars and cookies, as suggesting healthy and nutritious food products.⁶

We also note that there is no evidence of third-party registrations or uses of similar marks in the cereal and snack food field, or any other evidence which would show that opposer's mark is weak in the relevant market. In fact, opposer has demonstrated that NUTRI-GRAIN is strong in its field and thus entitled to a broad scope of protection. Opposer has used its NUTRI-GRAIN mark on a nationwide basis for over 15 years. In addition, total sales of opposer's breakfast cereals and cereal

people would even be able to identify the characters. (Mueller disc. dep. p.157).

⁶ Ms. Susan Jefferson, opposer's Director of Marketing, states in her declaration that NUTRI-GRAIN conveys "the combined attributes of nutrition and that the company's cereal products are derived from grains...." (p.2). Mr. Mueller states that NUTRI BRAIN suggests both nutrition and science. (dep. p.57).

bars under the NUTRI-GRAIN marks for the years 1991 through 1998 exceeded \$1.2 billion, with yearly sales for the combined products increasing from \$89 million in 1991 to over \$200 million in 1998, and opposer's promotional and advertising expenditures for that same time period exceeding \$380 million. The evidence also shows that opposer advertises and promotes its marks in national magazines and newspapers and by nationwide television commercials, and that its marks have received considerable media recognition and attention. We find that NUTRI-GRAIN is a strong, well-recognized mark in the cereal and snack food market, thus increasing the likelihood that the marks, when used on related products are likely to be confused.⁷

Finally, we note opposer's apparent claim that applicant acted in bad faith in adopting his mark. However, applicant's prior knowledge of the existence of opposer's marks (whether or not applicant conducted a "proper" search of PTO records) is not, in itself, sufficient to constitute bad faith. See *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307 (Fed. Cir. 1989). Establishing bad faith requires a showing that applicant intentionally sought to trade on opposer's good will or reputation. See *Big Blue Products Inc. v. International Business Machines Corp.*, 19 USPQ2d 1072 (TTAB 1991). There is no such evidence in this case.

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Nevertheless, applicant was clearly aware of opposer's marks and, as the newcomer, had both the opportunity and the obligation to avoid confusion by adopting a mark which is not similar to those marks. It has often been said that a party which knowingly adopts a mark similar to the well-known mark of another for closely related goods does so at his own peril, and all doubt on the issue of likelihood of confusion, even if we had any such doubt, is resolved against him. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); and Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc., 889 F.2d 1070, 12 USPQ2d 1901 (Fed. Cir. 1989).

Decision: The opposition is sustained.

⁷ Opposer does not claim, nor do we find, that NUTRI-GRAIN is a famous mark.